



**Committee on Small Business, Emergency Preparedness, Technical Colleges  
and Consumer Protection  
Wednesday, July 22, 2009**

**Senate Bill 190**

**Statement by  
Equipment Leasing & Finance Association**

This statement outlines Equipment Leasing and Finance Association (ELFA) opposition to Senate Bill 190. ELFA is the trade association representing financial services companies and manufacturers engaged in financing the utilization and investment of/in capital goods. ELFA members are the driving force behind the growth in the commercial equipment finance market and contribute to capital formation in the U.S. and abroad. Its over 600 members include independent and captive leasing and finance companies, banks, financial services corporations, broker/packageers and investment banks.

Senate Bill 190 inserts consumer concepts within business-to-business transactions financing equipment, thus intertwining commercial equipment contracts for tangible personal property with statutory models relating to real property for consumers. Although our industry is not engaged in transactions with consumers, the Analysis by the Legislative Reference Bureau reports this bill incorporates landlord-tenant doctrine applicable to residential property into commercial contracts that are based on the Uniform Commercial Code (UCC), which is an inappropriate convergence of unrelated concepts.

Senate Bill 190 creates a hybrid that equates the awareness of business owners entering a commercial equipment lease involving tangible personal property as being on par with consumers renting an apartment. Confusion is further heightened as this bill lacks a provision to clarify it would be operative to contracts entered into after the effective date. Renewal provisions have been widely used in equipment lease financing nationwide for many years without significant complaints or litigation. Please note UCC Article 2A contains detailed provisions regarding equipment leasing.

Equipment leasing and finance companies together with small businesses leasing equipment should discharge their legal responsibilities in a manner reflective of marketplace realities rather than tapping into consumer mandates. This interchanging of legal concepts that are considered mutually exclusive should be avoided in part because to raise capital to invest in new leases for business purposes, lessors frequently assign or package and securitize leases to institutional investors. Many of these leases contain automatic renewal provisions. Senate Bill 190 makes their assignment more complex and inhibits capital formation through assignments and securitization when the economy is facing a tightening of credit. Wisconsin should not make raising capital to invest in financing lessees more complex.

Regarding automatic renewals, ELFA supports clear and transparent disclosure of automatic renewal clauses in leasing contracts. Looking at the notice provisions in Senate Bill 190, they should be modified to function appropriately within the marketplace described by Wisconsin industry members during the hearing. In addition, we are deeply concerned about the provisions in the bill that (i) impose excessive and unreasonable penalties upon lessors, (ii) allow lessees to use equipment without paying for it and retroactively apply the bill to contracts that are already in place which by definition means that completely legal contracts would now be rendered in violation of this bill.

In the 2009 Survey of Equipment Finance activity, equipment financing in the state of Wisconsin grew by 40.7%. When comparing 2007 to 2008, Wisconsin is the 5<sup>th</sup> fastest growing state. Wisconsin ranks 21 among states in equipment finance volume. In 2008, true leases designed for businesses that seek flexibility to upgrade equipment while maintaining low monthly payments amounted to \$4 Billion out of \$650 nationwide and total equipment volume in Wisconsin within all categories makes up about 1.9% of all equipment financing in the United States. A more inclusive look at difficulties for this capital formation that is associated with Senate Bill 190 brings the following issues to attention:

- Clarify the statute applies only to equipment to be used in Wisconsin (*See first sentence of definition of "Business Contract" and definition of "Customer"*). While it is understood that the sponsor does not want to limit the Bill to services performed in Wisconsin, the Bill should not apply to equipment to be used outside the State of Wisconsin.
- Reduce exemption of contracts for \$250,000+/yr to \$50,000+/yr (*See exemption 1 under definition of "Business Contract"*). Aggregate annual rentals of \$50,000 equates to a monthly rental of nearly \$4,200. Contracts of this size are in almost all cases entered into by sophisticated customers, who, if not represented by counsel, will certainly be sure to carefully read, evaluate and negotiate the contract they are signing. For that reason, contracts of this size should not be covered by the bill.
- The language in the exemption of contracts for \$250,000+/yr refers to "an undetermined amount of business services" or "an undetermined amount of business equipment". This language is somewhat ambiguous and may create confusion. Nearly every lease is for specific items of equipment or services (not an unknown or undetermined amount of equipment or services). We have proposed language to clarify this exemption in that regard. (*See exemption 1 under definition of "Business Contract"*).
- Amend the vehicle exemption to include vehicles titled under Chapter 341 of the Wisconsin Statutes and/or registered under Chapter 342 of the Wisconsin Statutes (*See exemption 3 under definition of "Business Contract"*). This change would clarify that a lease of any titled vehicle (including trailers) would be exempt from the Bill's coverage.
- Clarify what appears to be the intent in exemption 10 to include **all leases** that allow the customer to terminate an auto-renewal provision upon one (1) month's notice (*See exemption 10 under definition of "Business Contract"*).
- Add exemption for a lease to, or purchase of services by, a Federal, state or local government entity (*See new exemption 11 under definition of "Business Contract"*).

## **(2) DISCLOSURE REQUIRED**

- Change the threshold for applicability from “30 days” to “one month” (*See 134.49(2)(a)*). This technical change is to acknowledge that not all months are 30 days.
- Provide that a seller can satisfy the disclosure requirement if either (i) the auto-renewal provision is conspicuous or initialed by the customer in the Business Contract or (ii) the customer signs a separate disclosure form (*See 134.49(2)(a)(2)*). A requirement that the customer sign a separate document or initial a page, in addition to the customer’s actual signature on the document, seems unnecessary if the required disclosure itself is conspicuous. For example, a customer’s jury trial waiver (which is an important provision in any contract) generally appears in all caps. There is no reason this same standard should not also apply to an automatic lease renewal provision.
- Inasmuch as the rent during most automatic renewal terms is the same as the rent applicable during the initial lease term (and does not increase), to reflect market practice, it would be appropriate to change Section (2)(b)(3) to allow the disclosure statement to either state what the renewal rent would be or describe the increase in rent should there be one. (*See 134.49(2)(b)(3)*).
- Both in Section (2)(c) and a proposed new Section (4)(b), it should be made clear that if the customer actually elects to renew or extend the contract, whether or not the seller has actually complied with the disclosure or notice requirements of the Bill, the contract should continue in effect and the seller should not be penalized for failing to comply with such disclosure or notice requirements. Customers should not be allowed to use the Bill as a means to rescind its election to renew merely because the seller did not technically comply with the Bill. As currently drafted, the Bill would allow a customer to affirmatively renew the contract, enjoy the use of the equipment and/or services for some period of time after the expiration of the original term of the contract, and then, not only cancel the contract, but possibly recoup any rent paid during the renewal term due to the seller’s technical violation of the Bill’s notice and/or disclosure requirements. This benefit to the customer amounts to unjust enrichment. (*See 134.49(2)(c) and proposed new (4)(b)*).

## **(3) NOTICE REQUIRED**

- Increase outside window for notice from “45” to “90” days (*See 134.49(3)*). This is a more reasonable timeframe within which sellers can be sure to take action to comply.

## **(4) MANNER OF GIVING NOTICE**

- Permit notice also to be given by a recognized overnight courier service (*See 134.49(4)(a)*). Common industry practice permits material and other important notices to be given in this manner.
- As described above, clarify that notice is not required if the customer elects to renew the contract (*See proposed new Section 134.49(4)(b)*).

## **(5) REMEDIES**

- Revise the remedies provision to provide that (i) the auto-renewal would be unenforceable if the seller did not comply with the Bill's notice and/or disclosure requirements and the customer did not otherwise elect to renew the contract, and (ii) in such event, the customer may terminate the contract upon written notice to seller, and claim damages resulting directly from the seller's non-compliance, BUT, customer would still be obligated for payments due during the renewal period (*See 134.49(5)*). In the event of a violation by a seller of the Bill's notice and/or disclosure requirements, the customer should not reap a windfall in the form of the free use of equipment or services during an automatic renewal period. A customer's remedies should be limited to the ability to terminate the renewal period (if it did not otherwise elect to renew the contract) and to make a claim for any actual damages; however, the customer should remain obligated to pay the contractual rent for any period of time that it received the benefits of the use of the equipment or services after the end of the initial term. As drafted, the Bill would allow a customer to enjoy the benefits of services or the use of equipment (as income-producing property in its business) for an indefinite period of time after the initial term ends, and then, whenever it sees fit to do so, terminate the renewal period and sue the seller for double damages, leaving the seller uncompensated for the services or equipment it actually provided to the customer and for which the customer received the benefits). This result would amount to unjust enrichment.

## **(6) SEVERABILITY**

- Clarify that violation of the statute will not affect the enforceability of the remaining provisions of the contract or seller's rights under the contract (*See new Section 134.49(6)*). This is a clarification preventing the Bill to have an effect which we understand was not intended by the sponsors.

## **SECTION 2. INITIAL APPLICABILITY**

- Provide that the statute would apply only to contracts entered into on or after the effective date of the statute (*See Section 2. Initial applicability.*). A retroactive application of this Bill would be unduly burdensome on sellers. The Bill should apply only to new leases entered into after the Bill's effective date.

Looking at other states, automatic renewal statutes in Illinois, Missouri and North Carolina pertain only to contracts with consumers for personal, family or household use. Statutes in New York and Rhode Island deal with business contracts but focus on notice to lessees unlike the expansive provisions of Senate Bill 190 outlined above.

I appreciate the opportunity to offer these comments on behalf of the Equipment Leasing & Finance Association (ELFA)

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Mike Metz

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### SB 190 : SMALL BUSINESS PROTECTION

#### **PREPARED FOR: SMALL BUSINESS, EMERGENCY PREPAREDNESS, TECHNICAL COLLEGES, AND CONSUMER PROTECTION**

Senate Bill 190 protects small businesses from hidden automatic renewal clauses in equipment and service contracts. This is an extremely important bill for the small businesses of our state. It is legislation that the small business owners in every legislative district understand.

This legislation evolved from many calls to our WIB member hotline. We have heard many complaints about automatic renewal clauses hidden in contracts. This bill came about because of abuses and the growing disparity in bargaining power between large and small businesses. Small businesses cannot avoid these hidden clauses unless they can do without such essential services as: waste hauling, credit card processing, uniform and towel services, computer hardware/software leases and shop equipment leases.

In this packet we have included some actual examples of these contracts. In one the automatic renewal clause was the 11<sup>th</sup> page of 16. Notice the size of type in the first example for credit card processing. In addition contract dispute resolution can be extremely difficult. One of the contracts calls for binding arbitration that must take place (by contract) in Collin County Texas.

Small business owners must constantly track the expiration date and the period for giving notice for each of these contracts. A small business can typically have up to 10 of these contracts. It is easy to trap the small business into continuing a contract that is no longer needed or wanted. SB 190 does not eliminate these clauses. It simply requires that the business owner be notified upon signing that the clause exists and that he also be notified before the clause will take affect.

Thirteen states have adopted or are considering some type of automatic renewal clause legislation. It is an issue whose time has arrived and Wisconsin business owners are looking for relief. WIB strongly encourages the committee to pass this much needed legislation to help protect the small business owners of Wisconsin.





5.12 Mail Order: CMS and Bank caution against mail order or telephone order transactions or any other transaction where the Cardholder and Card are not present, due to the high incidence of customer disputes. Merchant may solicit or accept mail orders or telephone orders or any transaction in which the Cardholder and Card are not present ("mail/telephone orders") only upon CMS prior written authorization. Mail/telephone orders completed in violation of prior written consent of CMS or Bank will be a breach of this Agreement and cause for immediate termination in addition to any other remedies available to CMS or Bank under the Rules. Merchant may be required to use an automated verification service ("AVS") for mail/telephone transactions. AVS is not a guarantee of payment and the merchant does not waive any provision of this Agreement or validate a fraudulent transaction. Merchant will obtain the expiration date of the Card for a mail/telephone order and submit the expiration date when obtaining authorization of the Card transaction. For mail/telephone order transactions, Merchant will type or print legibly on the signature line of the Sales Draft the following applicable words or letters: telephone order or "TO"; or mail order or "MO".

Merchant will not present any Sales Draft to Bank or CMS for processing (whether by electronic means or otherwise) which relates to the sale of goods or services for future delivery without CMS prior written authorization. If Bank or CMS have previously given such consent, Merchant represents and warrants to Bank and CMS that Merchant will not rely on any proceeds or credits resulting from such transactions to purchase or furnish goods or services. Merchant will maintain sufficient working capital to provide for the delivery of goods or services at the agreed upon future date, independent of any credit or proceeds resulting from Sales Drafts or other memoranda taken in connection with future delivery transactions.

**2.0 Rights, Duties, and Responsibilities of Bank and CMS**

14. Merchant agrees that this Agreement is a contract of financial accommodation within the meaning of the Bankruptcy Code, 11 U.S.C. § 365, as amended from time to time. Subject to this Section, Bank will deposit to the Merchant Account all net funds evidenced by Sales Drafts (whether evidenced in writing or by electronic means) complying with the terms of this Agreement and the Rules and will provide Merchant provisional credit for such funds (less recoupment of any credits), adjustments, fines, chargebacks or fees). If Bank or CMS reasonably believes that a chargeback or credit is likely with respect to any transaction or Sales Draft Bank and CMS have accepted, Bank and CMS may withhold payments due to Merchant from the funds; if the period of time by which time (i) Bank is charged back by the lessor ends, in such case, Bank shall return the funds; (ii) the period of time by which time the Bank or CMS has accepted the Sales Draft and the issuing bank may exercise its chargeback rights has expired; and/or (iii) Bank and/or CMS determines that a chargeback on the Sales Draft will not occur. Merchant acknowledges that its obligation to CMS and Bank for all amounts owed under this Agreement arise out of the same transaction as Bank's obligation to deposit funds to the Merchant Account.

(c) CMS or Bank may impose a cap on the volume and ticket amount of Sales Drafts that it will process for Merchant, as established by CMS or Bank. This limit may be changed by CMS or Bank from time to time. If Merchant exceeds the established limit, CMS or Bank may terminate this Agreement or suspend processing Sales Drafts, and either return all Sales Drafts evidencing funds over the cap to Merchant or hold those deposits in a separate Reserve Account. Merchant acknowledges that any monthly volume exceeding the established limit will cause the Merchant account to be reviewed and may result in the possible interruption of service and/or the delay of transmission of funds and/or the diversion of funds into a Reserve Account. Merchant hereby indemnifies and holds CMS and Bank harmless for any loss or consequential damages sustained by Merchant as a result of delayed funds.

**3.3 Acceptance**  
Notwithstanding any other provision of this Agreement, Bank and CMS may refuse to accept any Sales Draft, or revoke its prior acceptance, in any of the following circumstances:

In the event of a revocation of a prior acceptance of a Sales Draft, Bank may withdraw from the Merchant Account or Reserve Account any amount previously paid to Merchant for such Sales Draft.

**4.0 Account Monitoring**  
Merchant acknowledges that Bank and CMS will monitor Merchant's daily deposit activity. Merchant agrees that Bank and CMS may, upon reasonable grounds, divert the disbursement of Merchant's funds for any reasonable period of time deemed necessary to investigate suspicious or unusual deposit activity. Bank and CMS will make good faith efforts to notify Merchant of any such diversion. Bank and CMS shall have no liability for any losses, either direct or indirect, which Merchant may attribute to any diversion of funds disbursement. Any funds diverted shall be deposited immediately into a non-interest bearing account at Bank, and not be released until such time that questionable/suspect/ fraudulent transactions have been resolved to the Bank's and CMS' satisfaction.

Merchant represents and warrants to Bank and CMS all of the following:

(a) That all representations and statements made by Merchant or on Merchant's behalf in the Merchant Processing Application, or in any other document relating to this Agreement, are true, accurate and complete in all material respects. Merchant hereby authorizes Bank and CMS to investigate and confirm any information related hereto which is provided at any time by Merchant.

For this purpose, Bank and CMS may utilize credit bureaus/reporting agencies and/or their own agents. Upon Merchant's request, Bank and/or CMS will provide Merchant with a copy of the results of such investigation.

(d) That Merchant has the authority to enter into this Agreement and that the person(s) signing for or on behalf of Merchant is/are specifically authorized and directed to do so by Merchant.

goods or services; shall not involve any element of credit for any other purposes; represents a transaction which was placed by the Cardholder or other authorized user of the Card and was not previously charged back or declined; and is not subject to any other conditions or restrictions which may be raised by a Cardholder. Further, Merchant warrants that any credit

**5.1 Equipment**  
Bank and CMS shall have no liability for any negligent design or manufacture of any point-of-sale terminal, printer, or other

WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED, CONCERNING ANY EQUIPMENT, OR OTHER SERVICE PROVIDED BY OTHERS AND IN PARTICULAR MAKES NO WARRANTIES OF MERCHANT ABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE.

(b) Any damage or loss caused by negligence, fraud, dishonesty or willful behavior by Merchant or any of Merchant's employees

3.3 Limitation of Liability. Bank and CMS will use due care in providing services covered by this Agreement and the performance of all services called for in this Agreement shall be consistent with industry standards. The collective liability, if any, of Bank and CMS under this Agreement is limited to the actual damages, losses and expenses for which it or they may be legally liable, whether arising in negligence or otherwise, and shall not include any consequential or special damages.

assessments, over the previous 12 month period, calculated from the date the liability accrued. In no event will Bank or CMC or their agents, officers, directors or employees be liable for indirect, special, or consequential damages.

[illegible]

**1.1 Term**  
This Agreement shall become effective upon acceptance by Bank and CMS and shall continue in full force and effect for a term of two (2) years (365 months). This agreement shall auto renew for successive two (2) year terms thereafter unless written notice is

12. Termination. CMS or Bank may terminate this Agreement immediately at any time with or without cause upon providing Merchant with written notice of such termination. Merchant may terminate this Agreement upon 30 days prior written notice to CMS and Bank and payment of the termination fee forward set forth in the Summary of Fees) and any other amounts due hereunder.

In the event of termination of this Agreement for any reason, Merchant authorizes Bank to withhold and discontinue the disbursement of all funds evidenced by Sales Drafts and other payment transactions in process. Collected funds may be placed in the Reserve Account (defined below) until Merchant pays any outstanding charges or losses.

(b) Bank and CMS are authorized to debit the Merchant Account from time to time to establish or maintain funds in the Reserve Account, with or without prior notice to Merchant. Bank and CMS may deposit into the Reserve Account funds it would otherwise be obligated to pay Merchant, for the purpose of establishing or maintaining the Reserve Account in accordance with this section. Bank and CMS shall not be required to make any such deposit if Merchant, or any party acting on Merchant's behalf, pursues a claim against Bank or CMS, or if it determines such action is appropriate to protect its interest. Bank's and CMS' right to debit the Reserve Account pursuant to this Agreement shall in no way be limited by the limitation on the security interest in the Reserve Account. Bank's and CMS' right with respect to the Reserve Account, including the security interest therein, shall survive the termination of this Agreement. Bank and CMS shall have the right to close the Reserve Account, and the Reserve Account, if established, shall be the property of Bank.

(d) In no event will Merchant be entitled to a release of Reserve Account funds before 270 days following the effective date of termination of this Agreement, provided however, that the release of such funds to Merchant shall not relieve Merchant of any liability to CMS or Bank accruing either before or after such release. Bank will have sole control of the Reserve Account. Merchant

The rights conferred upon Bank and CMS in this Agreement are not in addition to or exclusion of or substitution for any rights and remedies of Bank and CMS under this Agreement, at law or in equity. Rather, each and every right of Bank and CMS at law or in equity will be cumulative and concurrent and in addition to every other right.

**8.6 Submitted Sales Drafts**  
Notwithstanding any termination of this Agreement, this Agreement shall remain in full force and effect with respect to any Sale which is not yet delivered to Bankers' Group by Merchant and not returned to Merchant prior to Bank's extending credit to the customer.

All notices under this Agreement shall be deemed delivered when mailed, postage prepaid, addressed as follows:

**NATIONAL CITY BANK OF KENTUCKY**  
1231 Dumett Lane  
Louisville, KY 40213-2008

**WOODFORD NATIONAL BANK**  
P.O. Box 219320  
Houston, TX 77218

Bank and/or CMS, the original of any such communication shall also be mailed to the intended recipient on the date of the electronic transmission and it shall not be deemed served on the receiving party until the mailed copy is received and confirmed by that party. If Bank or CMS gives notice by facsimile or other electronic communication to Merchant, service is deemed to have been made on the date of such transmission.

**10.1 Audits**  
Representatives of Bank and CMS may, during the normal business hours, inspect, audit and make records of Merchant's books

Merchant will not use for its own purposes, will not disclose to any third party, and will retain in strictest confidence all information and data belonging to or relating to the business of Bank and CMS (including without limitation the terms of this Agreement) and will safeguard such information and data by using at least the same degree of care that Merchant uses to protect its own confidential information.

**10.2 Force Majeure**  
Bank and CMS shall not be liable for any damages resulting from any performance or non-performance caused by circumstances beyond Bank and/or CMS control including, but not limited to, Acts of God, fire, flood, war, government action, labor trouble (

Bank and CMS may propose amendments or additions to this Agreement. Bank and CMS may make any amendments or additions to this Agreement in a periodic statement or other written notice. Merchant will be deemed to have agreed to the change if it continues to present transactions to Bank and CMS after 14 days from the date notice of the proposed change was sent. If Merchant does not agree to the change, it must inform Bank and CMS in writing within 14 days of the mailing of the notice.

of the notice of proposed amended terms, notwithstanding the previous sentence, either of the above vendors may increase the amount of the fee payable to it by Merchant by imposing a surcharge on Merchant's card payment transactions of an increase imposed by Visa, MasterCard, or telecommunication vendors without giving Merchant the right to terminate the Agreement.

**10.7 Attorney's Fees** Merchant shall reimburse Bank and CMS for any and all attorney's fees and other costs (including collection

10.8 Governing Law, Venue  
Any action or proceeding arising out of this Agreement by or against Bank or CMS shall be initiated and maintained under the laws of the State of New York. This Agreement shall be construed and governed by the laws of the State of New York.

**10.9 Dispute Resolution**  
Any dispute arising under this Agreement, shall be promptly submitted to binding arbitration in accordance with the rules of the American Arbitration Association in Collin County, Texas and in accordance with the corresponding laws concerning arbitration in the State of Texas. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association.

competent jurisdiction thereof. The arbitrator shall have the right to render equitable, as well as other, awards and relief, without limiting the foregoing, any party submitting such dispute shall request the American Arbitration Association to: (a) appoint single arbitrator who is experienced and knowledgeable in the field of industry relating to the subject matter of this Agreement

Neither the failure nor any delay on the part of Bank or CMS to exercise any right, remedy, power or privilege hereunder shall operate as a waiver or give rise to an estoppel nor be construed as an agreement to modify the terms of this Agreement, nor shall any single or partial exercise of any right, remedy, power or privilege hereunder with respect to any occurrence be construed as a waiver or give rise to an estoppel nor be construed as an agreement to modify the terms of this Agreement.

effective unless it is in writing and signed by the party making such waiver, and then such waiver shall apply only to the extent specifically stated in such writing.

**10.12 Cooperation.** Merchant agrees to execute, file and record such statements, notices and certificates as Bank or CMS may reasonably require to preserve and protect Bank's and/or CMS' interests.

11.0 Fees

as determined by CMS, for the previous business days or merchant activity, or was determined both jointly and severally by CMS and Merchant, shall be subject to audit by CMS at any time under this Agreement. CMS may adjust the fees as set forth in Section 10.4. Merchant agrees that all fees and charges are considered accurate and final unless Merchant disputes them in accordance with the provisions of Section 2.7(c). Furthermore, if a dispute is lodged it will be subject to arbitration and there will be no refund of any fee.

**11.2. Other Amounts Owed** Merchant will immediately pay CMS or Bank any amount incurred by CMS or Bank attributable to this Agreement, including but not limited to, Merchant's obligation to pay the Merchant's credit card processing fees and ACH debits that overdraw its

any kind now existing or later entered into between Merchant and CMS or Bank, whether the obligation is direct, indirect, primary, secondary, fixed, contingent, joint or several. In the event any such ACH does not fully reimburse CMS or Bank for the amount owed, Merchant will immediately pay CMS or Bank such amount.

Merchant authorizes Bank and CMS to debit from the Merchant Account any amounts paid by Bank or CMS to a third party on Merchant's behalf, including but not limited to monthly lease payments or other amounts owed by Merchant to a leasing company.

**11.5 Prior Processor Termination Fee Refund**  
If Merchant incurs a fee for canceling Merchant's immediately preceding credit card processing agreement in order to sign this Agreement, CMS may, at their sole and exclusive discretion, either reimburse Merchant for such fee up to but not exceeding \$100.00, or refund such fee to Merchant's credit card account. Merchant understands and agrees that Merchant is not entitled to a refund of such fee if Merchant terminates this Agreement within 90 days of the date of execution of this Agreement. Merchant understands and agrees that Merchant is not entitled to a refund of such fee if Merchant terminates this Agreement after 90 days of the date of execution of this Agreement.

the previous service provider. Any such reimbursement by CMS will occur after 90 days after the MID issued date, provided that Merchant has given CMS a bank statement evidencing the cancellation fee within 60 days after the MID issued date and Merchant is processing with CMS at the time of the reimbursement.

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1. **Directory Advertising**—Internet Service Terms and Conditions: Internet and eLibrary Yellow Book lists a list of Internet Service Providers that Publisher will publish directory advertising in. Links are also provided for Internet Services to share with the users and subscribers of the magazine. The same "Electronic" items in the Directory of Internet Service Providers are also available on the Internet. The terms "Electronic" items in the Directory of Internet Service Providers are also available on the Internet. The terms "Electronic" items in the Directory of Internet Service Providers are also available on the Internet.

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4. **Duration of Agreement** With respect to advertising in the *Practitioner*, the terms of this agreement shall be equal to the time period for each Directory. The time period for each Directory is 12 months from the date of publication. Publisher reserves the right to extend a Directory's time period by 12 months if more than 50% of the Directory's advertisers are not renewed. Any extension of a Directory's time period shall be at the discretion of the Publisher. The time period of this agreement shall be subject to the existing sales agreement between the Publisher and the advertiser. This agreement will continue in effect on the existing sales agreement as needed. Therefore this agreement with respect to advertising in the *Practitioner* shall be subject to the terms of the agreement on either Publisher's Customer contracts. Any extension under this paragraph shall be in writing and shall be effective 5 business days after receipt.

5. **Disconnection of Customer's Phone Number or Termination of Internet Services:** The change or disconnection of a phone number in an advertisement, or termination of Internet services by a customer, will not release Customer from its obligations under this agreement.

## 6. Payment (Print Advertising and Internet Services)

A. Customer agrees to pay the amounts listed on the reverse side of this agreement for the entire advertising on the "Internet" and/or "Internet" service.

If the publisher agrees, Publisher will bill Customer monthly for the same period of each month. Publisher may require full payment in advance or it is understood that Publisher may bill Customer in arrears or monthly, as indicated on the reverse side of this agreement. All payments will be accepted first in full, and then by subsequent billings thereafter.

C. For Internet Services. Publishers may require full payment in advance or, at its discretion, may bill its customer monthly or quarterly, as indicated on the reverse side of this agreement.

[illegible]

2. The negative may be applied to the photograph containing the image of the object.

4. Customers with a monthly charge of \$30.00 per month or less will be required to pay the full handling charges on all 3rd party handling charges for each installment bill received by Publisher. The handling charges will be waived for customers on the Autopay Program.

[illegible]

1. The first part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as  $\epsilon \rightarrow 0$ . It is shown that the solutions of the system (1) converge to the solutions of the system (2) in the sense of the weak convergence in the space  $L^2(\Omega; \mathbb{R}^n)$ . The second part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as  $\epsilon \rightarrow 0$ . It is shown that the solutions of the system (1) converge to the solutions of the system (2) in the sense of the weak convergence in the space  $L^2(\Omega; \mathbb{R}^n)$ .

under this agreement. Color is at the discretion of Publisher. No specific color is guaranteed. Publisher reserves the right to use any color ready or "spot" art if it does not meet Publisher's printing specifications.

It is Customer's responsibility to notify Publisher, in writing, of any and all name, address or telephone number changes prior to the applicable deadline of each Directory. If Customer fails to do so, Customer will remain obligated to make payments for its advertisement, regardless of whether Publisher is able to make the necessary changes.

[illegible][illegible]

10% ADJUSTMENT: TYPOGRAPHICAL ERRORS, INCORRECT TRANSIT LOGO, LAYOUT ISSUE/BOILERPLATE, APPEARANCE, FONT INCORRECT, E-MAIL OR URL, ADDRESS

100% ADJUSTMENT - COMMISSION OF ADVERTISER TAKEN IN TOGETHER WITH MAIN PHONE NUMBER  
NO ADJUSTMENT - PLACEMENT IN OTHER ADVERTISING WITH DIFFERENT PHONE OR FREE  
ADVERTISING PLACEMENT, NO PHONE OR ADVERTISING REFERENCE INFORMATION OR CREDIT IN  
CREDIT

[illegible]

8. **Cancellation/Notice to Publisher:** With respect to print services, Customer may cancel this agreement, upon written notice to Publisher, any time prior to the seventh (7) day after Customer signs this agreement. With respect to the foregoing services other than Web-Reach services, Customer may cancel this agreement at any time prior to the establishment of the Incentive Services. With respect to Web-Reach services, Customer may cancel this agreement at any time after the third (3) day after Customer signs this agreement, but no later than the date of the last issue of the publication. With respect to Web-Reach services, Customer may cancel this agreement at any time after the third (3) day after Customer signs this agreement, but no later than the date of the last issue of the publication.

[illegible]

9. Force Majeure: Publisher shall not be liable to the extent of the payment for any advertising from events beyond Publisher's control, including any accident, acts of God, strike, power or telephone failure or the inability to obtain access to any web site included in the Internet Service.

Customer represents and warrants that it has the right to use any trademark, trade name, or copyrighted material included in any copy submitted to Publisher. Customer also agrees, and warrants, that it has the right to use any artwork, portrait, picture or illustration of a person shown in any copy submitted to Publisher. Customer will indemnify Publisher, in writing, if Customer should cease to have any such right. Customer assumes sole responsibility for the protection of its intellectual property rights in any writing, internal illustration, design, map, photograph, or combination thereof, included in its entire advertisement for the Incent Services.

9. Customer represents and warrants that it holds all necessary permits and licenses to provide the products and services identified in its joint advertising on the Internet Services and to apply for and obtain the necessary permits and licenses to provide the products and services identified in its joint advertising on the Internet Services and to apply for and obtain the necessary permits and licenses to provide the products and services identified in its joint advertising on the Internet Services. Customer agrees that under the branding classification based on the reverse side of this agreement, Customer agrees that it is responsible for ensuring that its joint advertising and Internet Services comply with any laws or regulations that may be applicable to its business. Customer understands and agrees that National does not approve or endorse any of Customer's products or services, whether or not identified in Customer's joint advertising on the Internet Services.

C. Customer agrees to indemnify Publisher (and its employees, affiliates and agents) against, and hold Publisher (and its employees, affiliates, and agents) harmless from, all public claims, demands, suits or actions of various kinds, whether or not partially attributable to the negligence of Publisher, and will pay all expenses, including reasonable attorney fees, settlements, and/or judgments, incurred by Publisher in the defense thereof, arising out of Customer's breach or alleged breach of the foregoing representations and warranties.

11. **Successors and Assigns, Entire Agreement.** Customer acknowledges having entered into this agreement without relying upon any promises, statements, attitudes, representations, warranties, conditions or other understandings expressed, implied, and in writing, or specifically or forth herein. This agreement contains the entire understanding between the parties and shall bind the parties and their respective successors and assigns. Customer does not agree to rights hereunder without the prior written consent of Publisher, and no such assignment shall relieve Customer of its liability hereunder.

12. **Collection Expenses** In the event Publisher refers Customer's account to a collection agency or attorney due to a non-payment, Customer will be liable for all of Publisher's costs and expenses incurred in connection with Customer's non-payment, including, without limitation, court costs and reasonable collection of attorney fees up to 25% of the amount of the unpaid account balance (plus interest, second charges).

1.3. **Sales Rep. Not Authorized to Make Changes:** The sales representative of Publisher has no authority to make any changes in the agreement or to cause Publisher in any manner whatsoever to contravene the provisions expressly set forth in this agreement.

14. Miscellaneous:  
A. The individuals signing the statement on behalf of Customer agencies and vendors that he or she is authorized to sign as an agent subject to notice, an employee of Customer said that he is the sole owner and operator of Customer and, therefore, is not an agent of Customer.

14. This agreement shall be governed by, and interpreted in accordance with, the laws of the state in which Consumer Information is incorporated and whose offices are located.

C. Reeves Institute Sales Tax return available.

13 If any provision of this agreement is held to be unenforceable, such holding shall in no way render the other provisions hereof, and the agreement shall remain in full force and effect, and the agreement heretofore made by the parties shall remain in full force and effect.

5. This Agreement may be executed and delivered in any number of counterparts, and all such counterparts shall constitute the same instrument. Counterpart understandings that an authentic copy or electronic reproduction of this Agreement shall have same force and effect as an original.

3. This agreement supersedes any other verbal or written agreement between Customer and Publisher. This agreement may not be changed except by a written signed by an authorized signatory of Customer and Publisher.

**15. Authority Persons Obligated:** Signer **Obligated:** The signer agrees that he/she has the authority and is signing this agreement (1) in the individual capacity (2) as a representative of the Customer, and (3) as a representative of the entity identified in the advertisement for whose benefit the advertisement is being purchased. If the entity identified the advertisement is not the same as the Customer on the listing, by the execution of this agreement, the signer consensually and individually undertakes and assumes jointly and severally with the Customer, the full performance of this agreement, including payment of amounts due hereunder.





124 Gaither Drive  
Suite 170  
Mount Laurel, NJ 08054  
Phone: 888.479.9111  
Fax: 888.479.1100

# EQUIPMENT LEASE CONTRACT FOR LEASES UNDER \$25,000

Leasing Company ("Lessor," "We" or "Us"): Marlin Leasing Corp.

**Leasing Customer (You)**  
Company Name (Exact business name): Platinum Home Services, INC.  
Address: P.O. Box 1849 Woodruff Vilas UT 54568  
Street City County State Zip  
Phone: (215) 358-9771 Fax: (215) 358-9771 ☒ Corp. ☐ Limited Liability Corp. ☐ Partnership ☐ Prop.  
Equipment Location: 216 Elm Street  
Vendor: \_\_\_\_\_ Address: \_\_\_\_\_

**Description of Leased Equipment**  
PANASONIC COPIER (1918) CONSOLE (DS12) DOC FEEDER (A505)  
LAEK M 312913 LACLB 333838 GAMMA 316725

**Payment Schedule:**  
Lease Term (Mos.) 36 Total No. of Payments 36 Amount of Each Payment \$ 108.62 Security Deposit \$ 325.86  
(plus applicable taxes) Payment Freq. ☒ Monthly ☐ Quarterly ☐ Other

## Terms of Lease

1. You (the customer) want to acquire the above equipment from the above vendor. You want us (the leasing company) to buy it and then lease it to you. The Lease will not begin until we sign it, and once it starts it will continue for the entire term stated above. You will pay us all charges stated above. If you pay late, there will be a late fee of \$20.00 or 15% of the late amount, whichever is more. We may charge you a partial payment to cover the time between delivery and the due date for the first regular payment. Within 15 days after the end of the Lease you must return the equipment to us, in good working condition, at your cost (unless we have given you a purchase option that you exercise). You agree to reimburse us for any cost we incur to refurbish returned equipment. If you do not return it within 15 days, the lease will automatically renew for another 12-month period under the same terms and conditions described in this Lease. To expedite the Lease, you have asked us to accept your faxed signature and have agreed this will be considered as good as your original signature and admissible in court as conclusive evidence of this Lease. You also agree to allow us to adjust the payment amount above if the final equipment cost varies from the amount the payment was based upon.

2. You alone selected the vendor and the equipment. You asked us to buy it. We are not related to the vendor and we cannot get a refund. Therefore the Lease cannot be canceled by you for any reason, even if the equipment fails or is damaged and it is not your fault. We are leasing it to you "as is" and we disclaim all warranties, express or implied. You are responsible for all service. The vendor or manufacturer may have given you warranties. You may contact them to get a statement of those warranties, if any. You promise that the equipment will be used only for business and not for personal, family or household purposes.

3. If you do not pay us as agreed, you agree that we may (i) repossess the equipment and/or (ii) directly debit (charge) your bank account(s) and/or sue you for all past due rent and other charges and for all rent due in the future to the end of the Lease term. You must also pay our legal and other

costs. If we do not repossess, we may also directly debit and/or sue you for the "residual" (end of term) equipment value. This Lease will be governed by New Jersey law. You agree to be subject to suit in the New Jersey courts. We will have title to the equipment at all times. This is a "true lease" and not a loan or installment sale. You also agree this is a "finance lease" under Article 2A of the Uniform Commercial Code (UCC). If this is later determined not to be a "true lease," you grant us a security interest in the equipment. You give us power of attorney to file UCC financing statements at your cost.

4. You must pay us for all sales, use, property and other taxes relating to your use or our ownership of the equipment. Unless we have given you a written option to buy the equipment at the end of the Lease for \$1.00, we will be entitled to all tax benefits (such as depreciation, tax credits, etc.). If you do anything to disallow our getting these benefits, you will promptly indemnify (pay) us an equivalent amount. You will also indemnify us for all liabilities and losses to us relating to your use of, or the ownership of, the equipment. This promise will continue even after the Lease has ended. You accept all risks of loss and damage to the equipment. You must keep it insured against all risks of loss in an amount equal to the replacement cost and will have us listed on the policy as the "loss payee." If you do not give us proof of this insurance, we may, at our option, charge you a risk fee or get it insured ourselves and charge you for the cost.

5. Because this Lease is based on your own credit rating, you may not assign (transfer) the Lease or your rights to anyone else. You may not sub-lease or rent the equipment to anyone. We may sell or transfer our interests to another person or company, who will then have all of our rights but none of our obligations. Those obligations will continue to be ours. The rights we pass on to the new person or company will not be subject to any defenses, claims or set-offs you may have against us.

## Acceptance of Lease Agreement

This is a binding contract. It cannot be cancelled. Read it carefully before signing, and call us if you have any questions.

X Scott R. Clarkson Scott R. Clarkson President 2/23/01  
Signature of Leasing Customer Print Name of Signer Title Date  
X \_\_\_\_\_  
Accepted and Signed by MARLIN LEASING CORP. Print Name of Signer Title Date

## Personal Guaranty

I/WE HEREBY PERSONALLY AND UNCONDITIONALLY GUARANTEE ALL AMOUNTS OWED BY THE LEASING CUSTOMER UNDER THIS LEASE. I AGREE THAT YOU MAY EXTEND, TRANSFER AND OTHERWISE AMEND THE LEASE AND I AGREE TO BE BOUND BY ALL SUCH CHANGES. I WAIVE NOTICE OF DEMAND AND DEFAULT. I AGREE THE LEASING COMPANY MAY PROCEED AGAINST ME SEPARATELY FROM THE LEASING CUSTOMER. I CONSENT TO SUIT IN NEW JERSEY COURTS.

Scott R. Clarkson  
GUARANTOR #1 (Print Name)  
X Scott R. Clarkson 2/23/01  
Signature (Individually, No Titles) Date  
GUARANTOR #2 (Print Name)  
X \_\_\_\_\_  
Signature (Individually, No Titles) Date

## Acceptance of Delivery

I AM AUTHORIZED TO SIGN THIS CERTIFICATE ON BEHALF OF THE LEASING CUSTOMER. I CERTIFY TO THE LEASING COMPANY THAT THE EQUIPMENT HAS BEEN DELIVERED AND IS FULLY INSTALLED AND WORKING PERFECTLY.

X Scott R. Clarkson Scott R. Clarkson 2/26/01  
Authorized Signature Name and Title (Please Print) Equipment Delivery Date

# TERMS AND CONDITIONS OF SERVICE AGREEMENT

**TERM.** Customer grants to Contractor the exclusive right to collect and dispose of all of Customer's waste materials as warranted below (including recyclables) for an initial term of three years from the effective service date. The term of this Agreement shall be automatically renewed for like terms thereafter unless either party shall give written notice of termination by certified mail to the other at least sixty days prior to the termination of the initial term or any renewal term. In the event Customer terminates this Agreement or if then as provided above or Contractor terminates this Agreement for Customer's non-payment, Customer shall pay to Contractor as liquidated damages a sum calculated as follows: (1) if the remaining term under this Agreement is six or more months, Customer shall pay its most recent monthly charge multiplied by six; or (2) if the remaining term under this Agreement is less than six months, Customer shall pay its most recent monthly charge multiplied by the number of months remaining in the term.

**CHANGES AND COST INCREASES.** Because disposal and fuel costs are a significant portion of the cost of Contractor's services provided hereunder, Contractor may increase the Schedule of Charges proportionately to reflect any increase in such costs. The Schedule of Charges may also be adjusted from time to time to reflect increases in the Consumer Price Index. Subject to Customer's approval, the Schedule of Charges may be adjusted for reasons other than increases in disposal or fuel costs or the Consumer Price Index. Those changes in the Schedule of charges requiring Customer approval, and changes to the frequency of collection service or the amount, capacity and type of equipment used may be agreed to verbally, in writing or by the actions and practices of the parties. The parties may incorporate additional waste streams as a part of this Agreement so long as: (1) Customer has executed Generator's Waste Profile Sheet(s) with respect thereto; and (2) Contractor has approved, in writing, handling such waste streams of Customer. This Agreement shall not be affected by any changes in the Customer's Service Address if such new address is located within Contractor's service area.

**WASTE MATERIALS.** Customer warrants that the waste materials delivered to Contractor will not contain any hazardous, toxic or radioactive wastes or substances as defined by applicable federal, state, local or provincial laws or regulations. Customer acknowledges (reading the attached "Contractor's Definition of Special Waste" (dated 02/92), and warrants that the waste materials delivered to Contractor will not contain any Special Waste, as so defined, unless and except (1) as specifically described in the "Generator's Waste Profile Sheet(s)" either attached hereto and made a part hereof or subsequently provided to and approved, in writing, by Contractor; or (2) incidental amounts of Special Waste, as listed by Customer in the "Incidental Special Waste Types and Amounts" section of this form. Contractor shall acquire title to the waste materials when loaded into Contractor's vehicles; provided, however, that title to and liability for the waste materials excluded from this Agreement shall remain with Customer, and Customer agrees to indemnify, defend and hold harmless Contractor against all claims, damages, suits, penalties, fines and liabilities arising out of the breach of the above warranties including, without limitation, liabilities for violation of laws or regulations, for injury or death to persons or for loss or damage to property or the environment.

**SPECIAL WASTE.** If this Agreement covers Contractor's furnishing of services and equipment for Special Waste, then the following additional terms and conditions shall apply:

Customer warrants that the Special Waste delivered to Contractor has the components and characteristics meeting the description contained in the Generator's Waste Profile Sheet(s).

In the event that such Customer's Special Waste is later determined, or defined to be a hazardous, toxic or radioactive waste or substance, or if the storage or disposal facility receiving such Special Waste from Contractor ceases operations or is later prohibited, from receiving such waste, then the portion of this Agreement pertaining to such Special Waste may be immediately terminated by Contractor upon notice to Customer.

Customer agrees to comply with the precautions, conditions and limitations contained in Contractor's written notice of approval of such Special Waste.

If manifests or shipping papers are required by law to accompany the Special Waste to the storage or disposal facility, Customer is responsible for preparing all manifests or papers in form and number required by law.

**RESPONSIBILITY FOR EQUIPMENT.** The equipment furnished by Contractor hereunder shall remain the property of Contractor, and Customer shall have no interest in such equipment. Customer shall be responsible for all loss or damage to the equipment except for normal wear and tear or for loss or damage resulting from Contractor's handling of the equipment. Customer shall not overload (by weight or volume), move or alter the equipment, and shall use the equipment only for its proper and intended purpose. Customer agrees to indemnify, defend and hold harmless Contractor against all claims, damages, suits, penalties, fines and liabilities for injury or death to persons or loss or damage to property arising out of Customer's use, operation or possession of the equipment. On collection day, Customer shall provide unobstructed access to the equipment. If the equipment is inaccessible, Customer will be notified, and any additional collection service or attempt to provide such service shall be charged as an "extra pick-up."

**CHARGES AND PAYMENT.** Customer shall pay Contractor for its services in accordance with the Schedule of Charges shown on the face of this Agreement. Where the Schedule of Charges specifically indicates "dispose" as a component of the charges, "dispose" shall mean the posted gate rate for disposal at the disposal facility utilized by Contractor plus an appropriate handling charge. Customer shall be liable for all taxes, fees or other charges imposed by federal, state, local or provincial laws and regulations upon the collection, transportation or disposal of Customer's waste materials or the services performed hereunder. Payment shall be made by Customer within ten days after receipt of an invoice from Contractor. In the event that any payment is not made when due, Contractor may terminate this Agreement on notice to Customer, recover any equipment on the premises of Customer and recover the liquidated damages described above. Contractor may impose and Customer agrees to pay a late fee for all past due payments not to exceed the maximum rate allowed by applicable law.

**RIGHT TO COMPETE.** Customer grants to Contractor the right to compete with any offer which Customer receives (or intends to make) relating to the provision of nonhazardous waste collection and disposal services upon the termination of this Agreement for any reason, and agrees to give Contractor written notice of any such offer and a reasonable opportunity to respond to it.

**PAVEMENT DAMAGE.** Contractor shall not be responsible for damage to Customer's pavement or other driving surface resulting from the weight of Contractor's vehicles.

**ATTORNEY'S FEES.** In the event of a breach of this Agreement, the breaching party shall pay all reasonable attorney's fees, collection fees and costs of the other party incident to any action brought to enforce this Agreement.

**MISCELLANEOUS.** If any conflicts exist in this Agreement between terms which are printed and those which are typed or written, the typed or written language shall govern. This Agreement shall be binding on the parties and their successors and assigns. The representations, warranties and indemnifications contained herein shall survive the termination of this Agreement.

## PROCESSING SERVICE AGREEMENT

AC0925

THIS AGREEMENT is effective this 24<sup>th</sup> day of February, 1991, by and between ACCESS CASH INTERNATIONAL, INC., a Minnesota corporation, 4105 Lexington Avenue No., Arden Hills, MN 55126 (the "Company"), and Jor Gas Inc. (the "Merchant").

## RECITALS

Merchant owns or leases an automated teller machine ("ATM"). Company is in the business of providing processing services for ATMs. Merchant desires to engage Company to perform certain services as set forth herein.

NOW, THEREFORE, in consideration of the foregoing Recitals and of the covenants and agreements hereinafter contained, it is hereby agreed as follows:

1. **EQUIPMENT.** Merchant shall place a TRITON mini ATM MODEL 9500 on its premises in an indoor location mutually agreed upon and as identified in Exhibit 1 ("Premises").
2. **AVAILABILITY.** Merchant agrees that the ATM shall at all times remain available for use by Merchant's customers during Merchant's normal business hours for the term of this Agreement. However, Merchant shall make the ATM available during reasonable business hours so that Company may perform maintenance or system improvements. Generally, such maintenance should not exceed two (2%) percent of available time per calendar month.
3. **TRANSACTION PROCESSING FEES.** Company agrees to pay Merchant for each transaction made on the ATM. A "transaction" shall mean any cash withdrawal made from a cardholder's account. Company shall pay Merchant \$2.25 per transaction. Payments for transactions will be disbursed monthly by Company to Merchant on or before the 15th of each calendar month following the calendar month in which the transactions occurred. In addition, Merchant shall pay a \$50 monthly processor connection fee. Merchant authorizes Company to deduct such monthly charge from the transaction fee payable hereunder. The transaction fee may be increased or decreased by Company upon at least 45 days prior written notice to Merchant provided such increase or decrease is directly related to a corresponding cost incurred by Company in providing such service.
4. **TRANSACTION SURCHARGES.** In the event Merchant is legally permitted and chooses to impose a surcharge upon each transaction, Merchant hereby authorizes Company to receive, from transaction proceeds processed, a fee equal to twenty (20%) percent of the gross monthly surcharges paid per month. Company agrees that the remaining surcharge revenues shall be remitted to Merchant at the time the transaction fees described in paragraph 3 are paid.
5. **PROCESSING SERVICES.** Company agrees to provide data processing services, through its agreement with Deluxe Data Systems, Inc. or such other processing service as Company, in its sole discretion, may select, to process authorized ATM transactions. Merchant agrees to accurately complete, or has accurately completed, the Access Cash Merchant Application, and has completed and delivered or shall complete and deliver such other documents as are reasonably required to facilitate the implementation and delivery of such processing services.
6. **INVENTORY REQUIREMENTS.** Merchant shall, at its cost and expense, inventory an adequate supply of paper and ribbons at Merchant's Premises, which are available from Company. Merchant shall keep sufficient amounts of cash in ATM at all times, for normal expected transaction usage.
7. **PHONE AND ELECTRICAL REQUIREMENTS.** Merchant shall, at its expense, contract for and provide a local dedicated business telephone line and one (1) dedicated operating electrical power outlet (110V), both within three (3) feet of the ATM site. Merchant shall pay for monthly charges incurred in connection with such telephone line and electrical power usage.
8. **EXCLUSIVITY.** Merchant shall not permit the installation of any other ATM on Merchant's Premises, nor permit the removal of the ATM from the Premises for the term of this Agreement, except as may be agreed by Company in writing or required by any lessor of the ATM.
9. **INSURANCE REQUIREMENTS.** Merchant agrees to protect the ATM from damage, loss, theft or destruction. Merchant shall provide and maintain property insurance against loss, theft, damage or destruction of the ATM in an amount not less than the full replacement value of the ATM. Merchant agrees it shall make no alteration nor addition to the ATM, and shall not permit anyone

other than authorized representatives of the Company, to perform any service or repair work on the ATM unless it receives Company's prior written authorization.

10. **TERM.** This Agreement shall be for a term of five (5) years from the date of installation, unless amended or terminated by written agreement signed by both Company and Merchant or terminated by Company pursuant to paragraph 13 below. Notwithstanding anything contained herein to the contrary, Company shall have the option, in its sole discretion, to extend this Agreement for additional periods of five (5) years each.

11. **WARRANTIES AND REPRESENTATIONS OF MERCHANT.** Merchant warrants and represents as follows:
  - a) It is the owner of the Premises or that it holds a lease or option to renew the lease for said Premises of equal or greater length than the initial five-year term of this Agreement.
  - b) It is engaged in a lawful business and is duly licensed under the laws of the State, County and City in which Merchant and the ATM is located, to conduct such business.
  - c) It has not been terminated from settlement or card transactions by any financial institution or determined to be in violation of MASTERCARD or VISA rules and regulations.
  - d) It has the authority to enter into this Agreement with Company and that the person(s) signing for or on behalf of Merchant are specifically authorized and directed to do so by Merchant.

12. **EQUIPMENT RELOCATION.** In the event Merchant transfers or moves its business from the Premises, Merchant shall notify Company not less than thirty (30) days prior to any such event. In such event, this Agreement shall be automatically deemed amended to apply to Merchant's new location for any remaining term(s) of this Agreement.

13. **TERMINATION.** This Agreement and all obligations of the Company hereunder may be cancelled by Company in the event of Merchant's default under the terms of any lease for the ATM or in any event if Merchant fails to comply with the terms of this Agreement. Merchant may terminate this Agreement prior to the end of the then current term, provided Merchant gives Company 180 days advanced notice and pays Company a cancellation fee as follows: 30% of the average monthly charges which have been billed or collected by Company during the six (6) months prior to termination times the months remaining in the then current term of this Agreement. Merchant hereby authorizes Company to collect the cancellation fee on the termination date by electronic fund transfer from Merchant's clearing account.

14. **ATTORNEYS' FEES.** If suit or action is instituted to enforce or interpret any of the terms of this Agreement, the prevailing party shall be entitled to recover from the other party, in addition to costs, such sums as the court may adjudge reasonable for legal fees at trial and on any appeal therefrom.

15. **COMPANY NOT LESSOR'S AGENT.** Merchant understands and agrees that Company is not an agent of any lessor of the ATM, that it has no authority to act on behalf of or for any lessor, and that it is not authorized to waive or alter any term or condition of any lease for the ATM.

16. **COMPANY'S LIMITED LIABILITY TO MERCHANT.**
  - a) Company will use ordinary care in providing transaction processing service and will, at Company's expense, correct any errors that are due solely to Company's personnel. However, the expense of correcting such errors incurred by Company shall be the only responsibility of Company occasioned by its performance or non-performance of its obligations under this Agreement, and Merchant agrees to accept the correction of errors by Company as its sole and exclusive remedy. Merchant may not assert any claim against Company after one (1) year from the date that Merchant has or should have had knowledge of facts giving rise to such claim or any loss.
  - b) Company shall have no liability to third parties for any damages incurred by such third parties arising out of the performance or non-performance of services under this Agreement, and Merchant agrees to and hereby shall indemnify and hold Company harmless of, from and against any and all liability, claims, causes of actions or expenses relating thereto, including Company's attorneys' fees in connection therewith.



FORD DEALER COMPUTER SERVICES, INC.

This Agreement is between: Glacier Valley Ford & Mercury, Inc.

Name

615 South Blvd

Address

Baraboo, WI 53913

City

State

Zip

hereinafter referred to as Dealer, and FORD DEALER COMPUTER SERVICES, INC., hereinafter referred to as FDCS.

THIS AGREEMENT IS SUBJECT TO ARBITRATION UNDER APPLICABLE STATUTE.

SECTION 1. DEFINITIONS.

**Application Program** - A series of programs which enable the computer to perform a specific task such as the processing of a payroll.

**Documentation** - All information in human-readable form, including specifications, manuals, books, pamphlets, enhancement notifications, utilities, report generators, documents, drawings, and other tangible items which explains the capabilities of the Software and provides operating instructions for using the Software to obtain desired results.

**Enhancements and/or Modifications** - Any modification or addition that, when made or added to the Licensed Software, materially changes its utility, efficiency, functional capability, or application.

**Equipment** - All of the computer equipment listed in Schedule A and/or Schedule C, which is sold and/or maintained by FDCS.

**FDCS In-Dealership Computer System** - The FDCS computer system for automobile dealerships including but not limited to all Equipment, Software, and communications devices.

**Firmware** - Micro-programs which enable various types of equipment to function with FDCS Software.

**Foreign Device** - A foreign device is defined as any device that was not sold by FDCS or Ford Motor Company Dealer Computer Services division, unless specifically provided for in this Agreement.

**Licensed Copy** - All FDCS authorized copies, in any format, of the Licensed Software in the possession of Dealer.

**Licensed Software** - All Software, as defined herein, a license for which is granted to Dealer pursuant to Section 5 of this Agreement.

**On-Line Parts and Vehicle Locator Service** - Service which enables Dealer to inquire into other FDCS clients' parts and vehicle inventory records and vice versa in order to locate a given parts or vehicle inventory item rapidly so that it may be readily purchased from the closest point.

**Operating System** - A series of programs which enable the computer to perform its general internal supervisory processes that are not specific to any Application Program. These processes include communications, database, and print spooling functions.

**Program** - A series of instructions that tell the computer how to perform a task.

**Remedial Maintenance** - Maintenance service on Equipment for failures which have occurred as a result of routine normal use and excluding any failures as described in Section 4(G) "Exclusions to Remedial Maintenance."

**Site Ready Agreement** - Form prepared by FDCS and acknowledged by Dealer describing the specifications for Dealer's computer location and environment.

**Software** - A general term used to describe all Programs used inside the computer and peripheral devices to make them perform any function. This term includes Operating System, Application Programs, Documentation, corrections or Modifications, Enhancements, microsoftware, and Firmware used within the central processing unit or within any peripheral device, terminal, or printer attached to the system.

**B. Dealer On-Line Parts and Vehicle Locator Service Responsibilities.**

As a part of this Agreement, Dealer acknowledges and agrees to accept the following responsibilities:

1. Dealer is responsible for reporting all data circuit failures, as they occur, to FDCS. FDCS will coordinate all repairs to the data circuit with the applicable communications company.
2. Dealer will cooperate with FDCS as necessary in making tests to isolate any problems with the data circuit.

**C. Permission to Disclose Dealer Data.**

The very essence of the On-Line Parts and Vehicle Locator Service is the sharing of data regarding parts and vehicle inventories among the clients of FDCS. Dealer therefore authorizes FDCS to provide Dealer's parts and vehicle inventory data to all other clients of FDCS; however, Dealer acknowledges that only parts inventories of Ford and Lincoln/Mercury franchises controlled by the Parts Inventory Control Software of the FDCS In-Dealership Computer System can be accessed through the On-Line Parts Locator Service.

**D. Disclaimer of On-Line Parts and Vehicle Locator Service Warranties and Limitation of Liability.**

FDCS represents that so long as Dealer pays the charges stated in Schedule E for connection to the On-Line Parts and Vehicle Locator Service, FDCS will make every reasonable effort to provide access to the On-Line Parts and Vehicle Locator Service during the term of this Agreement. However, Dealer acknowledges and agrees that providing this Locator Service is an undertaking of the highest technical complexity. Dealer further acknowledges and agrees that in order for FDCS to provide this Locator Service, FDCS requires the services of other subcontractors, including Ford Motor Company and various communications companies, and the agreements that FDCS has with these subcontractors may not provide any recourse to FDCS in the event such subcontractor fails to perform as required.

**DEALER THEREFORE RELEASES FDCS FROM ANY LIABILITIES WHATSOEVER FOR FAILURE TO PROVIDE ACCESS TO THE ON-LINE PARTS AND VEHICLE LOCATOR SERVICE (DOWN-TIME), FOR ANY FAILURE BY THIRD PARTIES, OR FOR ANY OTHER REASON BEYOND FDCS' REASONABLE CONTROL.**

**EXCEPT AS SPECIFICALLY PROVIDED HEREIN, THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY FDCS WITH RESPECT TO THE ON-LINE PARTS AND VEHICLE LOCATOR SERVICE OR ANY OTHER SERVICES CONTEMPLATED HEREIN.**

**NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, FDCS SHALL NOT, UNDER ANY CIRCUMSTANCES, BE LIABLE TO DEALER FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, EVEN IF IT HAS BEEN APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING. DEALER'S SOLE AND EXCLUSIVE REMEDY HEREUNDER SHALL BE RESTORATION OF THE PARTS AND VEHICLE LOCATOR SERVICE.**

**SECTION 9. DISCOUNT.**

If Dealer purchases all printed forms and supplies (including stock paper, ribbons, print-wheels, etc.) that are used in conjunction with the FDCS In-Dealership Computer System from FDCS, and maintains all CRTs, printers, modems, personal computers, other peripheral equipment, CPUs, disk drives, tape drives, and power conditioners attached to the FDCS In-Dealership Computer System with FDCS, a discount as stipulated in Schedule C will be given on all Monthly Maintenance Charges for Equipment.

**SECTION 10. TERM AND EXTENSION OF AGREEMENT.**

The term of this Agreement shall be for one hundred twenty (120) months from the date when the computer system is operational ("Original Term"), such date to be conclusively designated by FDCS. Following the expiration of the Original Term, this Agreement shall automatically be extended for like periods ("Extension Term"), unless either party gives the other written notice to terminate one hundred eighty (180) days prior to the expiration of the Original Term or the then current Extension Term.

Fourth Floor  
1 South Pinckney Street  
P.O. Box 927  
Madison, WI 53701-0927

Phone • (608) 257-9521  
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**Gary L. Antoniewicz**  
Direct Dial Number • (608) 283-1759  
gantoni@boardmanlawfirm.com



July 21, 2009

Senator Robert Wirch  
Chair  
Committee on Small Business, Emergency Preparedness,  
Technical Colleges and Consumer Protection  
State Capitol  
Madison, WI 53703

**Re: Midwest Equipment Dealers - Support of Passage of SB 190**

Dear Senator Wirch and Members of the Committee:

Our firm represents the Midwest Equipment Dealers Association ("MEDA") comprised of farm, industrial, construction and lawn and garden dealers throughout the state. MEDA supports passage of SB 190 as now before the Committee.

Last winter at area meetings with members we had discussions on this issue. After these meetings, we realized how many members have been affected by hidden automatic renewal clauses in contracts with service providers and office equipment vendors. Numerous horror stories were presented by members as to how they were forced to continue unwanted services for years because they had failed to send a notice during a cancellation window hidden in the contract.

SB 190 does not ban automatic renewal clauses, but it does promote fairness in transactions by imposing notice requirements. It simply provides for notice before a contract automatically renews and provides an opportunity to cancel.

MEDA wishes regulation like this would not be necessary, but it is. Many service providers have made extreme efforts to create contracts hiding renewal clauses and tricking customers into longer terms than initially represented. Such abuses have created the need for SB 190.

MEDA urges passage of SB 190 and believes the time to act has come. Thank you for your support.

Sincerely,

Boardman, Suhr, Curry & Field LLP

By

  
Gary L. Antoniewicz

GLA/jmc